

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Streamlining Deployment of Small Cell)	WT Docket No. 16-421
Infrastructure by Improving Wireless Facilities)	
Siting Policies)	
)	
Mobilitie, LLC Petition for Declaratory Ruling)	

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE
OF CITIES, THE NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS,
NATIONAL ASSOCIATION OF COUNTIES, NATIONAL ASSOCIATION OF
REGIONAL COUNCILS, GOVERNMENT FINANCE OFFICERS ASSOCIATION, AND
UNITED STATES CONFERENCE OF MAYORS**

“It comes down to how ... stupid the elected officials ... are. There are many stupid cities around the country - really dumb. They’re greedy...They don’t give a s*** about their constituents.”

Mobilitie CEO Gary Jabara¹

Obviously, Mobilitie and its CEO hold local governments in utter contempt. With this attitude, Mobilitie and its representatives march into jurisdictions and make demands, expecting local governments to accede to the demands regardless of the needs of the communities.

These Reply Comments are filed by the National Association of Telecommunications Officers and Advisors (NATOA), the National League of Cities (NLC), the National Association of Towns and Townships (NATaT), National Association of Counties (NACo), National Association of Regional Councils (NARC), Government Finance Officers Association (GFOA), and the United States Conference of Mayors (USCM),² in response to the Comments filed in the

¹ Don Bishop, *Seeing Wireless Service as Essential Speaks to the Future of Wireless Infrastructure*, AGL Magazine AGLM, p.38 (March 2017).

² The United States Conference of Mayors is the official non-partisan organization of cities with a population of 30,000 or larger. Each city is represented by its chief elected official, the mayor.

above-entitled matter.

I. THE TAKINGS CLAUSE PREVENTS THE COMMISSION FROM LIMITING “FAIR AND REASONABLE COMPENSATION” IN § 253(c)

As we explained in our opening Comments, the United States Supreme Court has long recognized the ability of local governments to seek rent as compensation for physical occupations of local rights-of-way and other government property.³ The Telecommunications Act of 1996 did not change that and, as NATOA and its fellow Commentators established, Congress was aware of local government’s practice in charging rent and specifically protected that ability.⁴ For the Commission to use interpretations and guidelines to find otherwise, as several Commentators request,⁵ would violate the Fifth Amendment, which provides:

“[N]or shall private property be taken for public use, without *just compensation*.”⁶

If the Commission adopts interpretations of the §§ 253 and 332(c) which require that local governments accept the placement of wireless facilities and associated equipment in their local rights-of-way and in, or on, other property (water towers, light poles, street signs, public buildings, and the similar property), such as through a “deemed granted” regime, then the Commission has committed a physical taking.⁷ The Supreme Court’s opinion *Loretto v.*

³ See, *Comments of NATOA, et al.*, at 16-21 (filed March 8, 2017).

⁴ See, *Comments of NATOA, et al.*, at 21-24.

⁵ *Comments of Competitive Carriers Association* at 16 (filed March 8, 2017); *Comments of AT&T* at 22 (filed March 8, 2017); *Comments of Verizon* at 11 (filed March 8, 2017).

⁶ U.S. Const., amend. V. (Emphasis added.) While the Fifth Amendment refers to “private property,” it is “most reasonable to construe the reference...as encompassing the property of state and local governments. *United States v. 50 Acres of Land*, 469 U.S. 24, (1984). See also, *Town of Bedford v. United States*, 23 F.2d 453, 457 (1927) “[The federal government] can no more take, without compensation, [a local government’s] property rights, than it can those of an individual.”

⁷ 458 U.S. 419, 429-30 (1982), *relying on Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U.S. 540, 570 (1904) (holding that placement the telephone lines in railroad right of way was a compensable taking because the right-of-way “cannot be appropriated in whole or in part except upon the payment of compensation”); *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 181 (1872)(“[W]here real estate is actually invaded ... so as to ... impair its usefulness, it is a taking, within the meaning of the Constitution.”), as well as citing *Lovett v. West Va. Central Gas Co.*, 65 S.E.196 (W. Va. 1909); *Southwestern Bell Telephone Co. v. Webb*, 393 S.W.2d 117, 121 (Mo.App.1965). for the proposition that telegraph and telephone lines and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space.

Teleprompter Manhattan CATV Corp., makes clear that a “property owner suffers a special kind of injury when a stranger directly invades and occupies the owner’s property.”⁸ Fair market value is the standard for “just compensation.”

Absent requiring physical occupation, the Commission may yet commit a regulatory taking with any interpretations or guidelines it issues as a response to this proceeding. The Supreme Court discussed regulatory takings with respect to Commission action in *F.C.C. v. Florida Power Corp.*⁹ In that case, the Court did not find a *Loretto* taking because nothing in the Pole Attachments Act, as interpreted by the FCC, gave cable companies any right to occupy space on utility poles, or prohibited utility companies from refusing to enter into attachment agreements with cable operators. Ultimately, the Supreme Court did not find that the Fifth Amendment’s Takings Clause applied to rate regulation in *Florida Power Corp.* because the Florida Power did not argue that the regulation was “confiscatory.” That is, it did not argue that the regulation threatened its “financial integrity.”¹⁰ We do argue that any Commission action which limits the ability of local governments to seek compensation in the form of rent or other fees for the use of their rights-of-way or other property will be confiscatory.

Any such limitation is confiscatory because, unlike telecommunications providers, local governments are not for-profit corporations. They are not-for-profit entities; convenient vehicles for groups of citizens to come together to undertake activities for the benefit of all within their jurisdiction. Their “investors” are their citizens who “invest” by paying taxes. Local governments can borrow money under certain circumstances, but they do not manufacture products or sell services for the purpose of making a return on investment for private

⁸ *Id.* 458 U.S. at 436.

⁹ 480 U.S. 245, 252-53.

¹⁰ *See, Verizon Communications Inc. v. F.C.C.*, 535 U.S. 467, 524 (2002)

shareholders. The mechanisms by which local governments provide libraries, schools, police and fire protection, and roads, highways, and other infrastructure are primarily taxes. In addition, they make use of the property they hold in trust for the public by renting, leasing, or otherwise charging for the private use of that property. The Petition and the Comments supporting it ask the Commission to take that authority away from local governments and to allow private, for-profit entities, to make essentially free use of public property to further their own bottom line. They ask that the taxpayers subsidize private corporate business activities by limiting the amount the taxpayers, through their local governments, can charge for property they own collectively. That effectively destroys the value of the property, that is “confiscation,” and that is a regulatory taking.

As an aside, the same rationale supporting compensation for the use of public rights-of-way applies with even greater force to other property owned by local governments. The Town Hall, city library, and municipal water tower, all owned by local government, are the local government’s “private” property, to control as it wishes, including having the ability to exclude third parties regardless of the reason for the exclusion. If the federal government and third parties are going to take local government property by physically occupying it, “just compensation” must be paid as it would be for any other private party. “Manifestly, the ‘just compensation’” must go to or for the benefit of the persons damaged by the taking - in this case the taxpayers....We can find *not even a dictum* in the decisions of the Supreme Court to support any other doctrine.”¹¹

II. FEDERALISM PRINCIPLES FORECLOSE PROPOSED INTERPRETATIONS

While any Commission “interpretation” limiting local government compensation to costs

¹¹ *Town of Bedford v. United States*, 23 F.2d 453, 455 (1st Cir. 1923) (*emphasis added*), citing *St. Louis v. Western U. Teleg. Co.*, 148 U.S. 92 (1893) and *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U.S. 160 (1903).

is foreclosed pursuant to the requirements of the Fifth Amendment as applied to physical and regulatory takings, there is also a serious question as to the extent of Commission authority to interpret phrases and terms in either §§ 253 or and 332(c) so as to limit local government authority, especially with respect to any “deemed granted” remedy or foreclosing the availability of moratoria while appropriate zoning and local regulatory processes are put in place.

It is unreasonable to assume that Congress intends to allow federal officials to interfere with the public purposes of sovereign states without express authority.¹² There exists a presumption that authorized public uses are not to be interfered with under general terms of federal legislation.¹³ The Federal Highway Act¹⁴ serves as an example of what express authority looks like. That Act specifically allowed the Secretary of Commerce to file condemnation suits to take local government property, upon the request of a State, to build the Federal Highway System. Unlike the Federal Highway Act, the Telecommunications Act contains **NO** provision allowing the Secretary of Commerce or the Federal Communications Commission to condemn or otherwise take public property for the purpose of constructing the nation’s “Information Super-Highway.” What the Telecommunications Act **does** contain is **two** clauses that specifically recognize local government authority over 1) zoning decisions (§332(c)(7)) and 2) the right to manage rights-of-way and charge “fair and reasonable” compensation (§ 253(c)). The Commission *cannot* interpret terms and phrases in code sections that recognize, reiterate, and preserve state and local authority in such a way as to limit that same authority. Such back-door, boot-strapping violates the very core of federalism requirements and is contrary to the obvious congressional intent of including two clauses noting the preservation of local authority.

¹² *Town of Bedford* 23 F.2d at 455, quoting *United States v. Certain Lands in Town of New Castle Case (C.C.)*, 165 F. 783, 788 (1908).

¹³ *Id.*

¹⁴ 23 U.S.C. 107(a).

“[R]egulation of land use [is] a function traditionally performed by local governments.”¹⁵ Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to “recognize, preserve, and protect the primary responsibilities and rights of [local governments]... to plan the development and use... of land”¹⁶ for the purposes of telecommunications deployment. The Commission has no authority to reduce that preservation of authority by “interpreting” phrases in the statute. Where, as here, “an administrative interpretation of a statute invokes the outer limits of Congress’ power,” courts expect a clear indication that Congress intended that result.¹⁷ “Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”¹⁸ Federalism concerns are heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.¹⁹ “[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”²⁰ Not only did Congress not convey its purpose clearly to allow the Commission to adopt the interpretations urged by industry commentators, Congress clearly expressed just the opposite in the text of the statute, as well as in the legislative history.

III. A NOTE ON THE LEGISLATIVE HISTORY

Industry Commentators make the same mistake as *Mobilitie* did in its petition and cite to the Statements of Senator Diane Feinstein as support for the proposition that local governments may only charge for “costs” associated with a physical invasion of the rights-of-way.²¹ Because

¹⁵ *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994).

¹⁶ *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 174 (2001).

¹⁷ *Id.*, 531 U.S. at 172, quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

¹⁸ *Id.*, 531 U.S. at 172-73.

¹⁹ *Id.*, 531 U.S. at 173.

²⁰ *United States v. Bass*, 404 U.S. 336, 349 (1971).

²¹ See, *Comments of Verizon*, at 15-16.

this has become such a common mistake on the part of not only industry Commentators, but also the Commission and even some courts, NATOA, *et al.*, have attached the relevant pages from the Congressional Record as Exhibits A and B to this filing, and encourage the Commission to actually read Senator Feinstein's statements, as well as those of Representative Stupak.

IV. EVIDENCE IN THIS PROCEEDING

Regarding the evidence in this proceeding, we point the Commission to all the comments filed by local governments taking issue with the factual representations of Industry Commentators. We specifically urge the Commission to take note of the materials filed by Spotsylvania County, Virginia, the Village of Lloyd Harbor, New York, and Leesburg, Virginia, some of the communities named by the Industry Commentators but unaware of that until contacted by NATOA. Additionally, attached as Exhibit C are summaries of conversations with other local governments who were not in a position to file separate Reply Comments.

In evaluating the evidence before it, the Commission should know that as of 2012, 89,004 local governments existed in the United States.²² This included 3,031 counties, 19,522 municipalities, 16,364 townships, 37,203 special districts and 12,884 independent school districts.²³ This proceeding focuses primarily on counties, municipalities, townships and perhaps a few special districts. To be conservative then, this proceeding concerns approximately 38,910 local governments. Industry Commentators have named approximately 60 local governments as allegedly doing something they think is somehow interfering with their ability to provide personal wireless or telecommunications services. It should be striking how few communities are alleged to be "effectively prohibiting" the provision of services considering the sweeping

²² 2012 United States Census of Governments, available at <https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html>

²³ *Id.*

regulatory solution that is being sought.

It would be laughable, were the consequences not so serious, that the Commission would base any curtailment of local government authority on the often spurious and incorrect allegations made against such a small number of local governments. Even when one is generous to Industry Commentators and includes their veiled references to “A Mid-Atlantic City” or “a city in the Northeast,” Industry Commentators have referenced approximately 600 local governments as somehow inhibiting their progress. This number is overly generous, as we believe that several allegations are listed separately, but, in reality, refer to the same community and are therefore double counted. Regarding the probative value of such allegations, Industry Commentators might as well assert that the moon is made of Swiss Cheese. Accordingly, the Commission should give no weight to this “evidence.”

The Commission would do well to consider the reverse:

No local government was complained of in the following 19 states (the numbers behind the state names signify the number of local governments in each state): Alabama (528), Arkansas (577), Connecticut (179), Delaware (60), Idaho (244), Kentucky (536), Mississippi (380), Montana (183), Nebraska (1,040), New Mexico (136), North Dakota (1,723), Rhode Island (39), South Carolina (316), South Dakota (1,284), Tennessee (437), Vermont (294), Utah (274), West Virginia (287), Wyoming (122).²⁴ Collectively, these states have a combined total of 8,639 local governments within their borders. *As none were named, the Commission must conclude that these 8,639 communities have processes that are working well and appropriately.* They are processing applications in a timely manner, with no burdensome conditions. The Industry Commentators’ own comments stand for this proposition – were this not so, Industry

²⁴ Any error of with respecting to identifying named communities or the numbers of them is unintentional.

Commentators would have provided evidence to the contrary.

Similarly, only one allegation is made against an often-unnamed local government in each of these eight states: Alaska (162), Colorado (333), Hawaii (4), Kansas (1,997), Louisiana (364), Maine (504), New Hampshire (244), and Oklahoma (667) – a total of 4,275 communities. *The conclusion must be that the remaining 4,267 communities in these states are processing applications appropriately and not “effectively prohibiting” the provision of services.*

Likewise, approximately five allegations were made against largely unnamed local governments in the following 10 states: Indiana (1,666), Iowa (1,046), Maryland (180), Michigan (1,856), Missouri (1,380), Nevada (35), New Jersey (587), North Carolina (653), Ohio (333), Oregon (277), and Wisconsin (1,923) - a collective total of 11,936 governments. *This means that approximately 11,886 local government entities in these states are not impeding deployment in any way.*

Approximately ten local governments were complained of in each of these nine states: Arizona (106), Georgia (688), Illinois (2,831), Massachusetts (356), Minnesota (2,724), New York (1,600), Pennsylvania (2,627), Virginia (324), and Washington (320) – a collective total of 11,576 governments. *Based on these calculations, 11,486 local governments are working well with providers.*

The States of California, (539 communities and approximately 74 allegations of misconduct); Florida (476 local governments and approximately 27 allegations of misconduct), and Texas (1,468 communities and approximately 12 allegations of misconduct) make up the remaining states. And absent any detail, the Commission should take the providers allegations for exactly what they are worth: Nothing. Without specifics – at a minimum identification of the communities - there is NO EVIDENCE of effective prohibition before the Commission.

CONCLUSION

The Commission does not have the authority to issue interpretations or guidelines which would curtail local government authority under Sections 253 or 332(c) and the Industry Commentators have not supplied credible or substantial evidence on which the Commission could base its actions even if it was empowered to radically alter local government authority over public rights-of-way or local government property.

Respectfully submitted,

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